No. 91-1143

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*,
Petitioners,

—v.—

MARILYN ROSE WEBB, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana

REPLY BRIEF FOR PETITIONERS

Kevin F. Risley
Thomas W. Taylor
BUTLER & BINION
1600 First Interstate
Plaza Bank
1000 Louisiana
Houston, Texas 77002-5008

Of Counsel

David W. Rivkin
Donald Francis Donovan
Counsel of Record
Mary Ann Doyle
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Petitioner
Owens-Corning
Fiberglas Corporation

(*Additional counsel listed inside the front cover*)

February 25, 1992

Dennis Chambers
ATCHLEY, RUSSELL, WALDROP
& HLAVINKA
P.O. Box 1049
Texarkana, Texas 75504

Attorneys for Petitioner
Keene Corp.

Greg Bevel
DEHAY & BLANCHARD, L.L.P.
Plaza of the Americas
2500 South Tower, LB 201
Dallas, Texas 75201-2880

Attorneys for Petitioners
Armstrong World Industries, Inc.
and National Gypsum Co.

Mel Bailey
DEHAY & BLANCHARD, L.L.P.
Plaza of the Americas
2500 South Tower, LB 201
Dallas, Texas 75201-2880

Attorneys for Petitioner
Georgia-Pacific Corp.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. ANY PRESUMPTION IN FAVOR OF CONCURRENT PROCEEDINGS HAS NO APPLICATION WHERE ONE FORUM HAS NO SUBSTANTIVE INTEREST IN THE SUBJECT MATTER OF THE CONTROVERSY 1

II. PLAINTIFFS' DESIRE TO HAVE TEXAS REGULATE BEYOND ITS BORDERS CANNOT JUSTIFY THE INJUNCTION..... 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases: PAGE

Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3 ..... 3, 4

China Trade and Development Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987)..... 1, 2

Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).... 5

Equal Employment Opportunity Commission v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) 5

In re Insurance Antitrust Litigation, 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *petitions for cert. filed*, No. 91-1111 (Jan. 9, 1992), No. 91-1131 (Jan. 10, 1992), No. 91-1128 (Jan. 13, 1992), No. 91-1146 (Jan. 13, 1992)..... 6

Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)..... 1, 2

PPG Industries, Inc. v. Continental Oil Co., 492 S.W.2d 297 (Tex. Civ. App. 1973)..... 3

Randall v. Arabian American Oil Co., 778 F.2d 1146 (5th Cir. 1985)..... 2

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)..... 3

Other:

Restatement (Third) of the Foreign Relations Law of the United States (1987)

§ 213..... 3

§ 402..... 3

§ 403..... 3, 4

REPLY BRIEF FOR PETITIONERS

In their brief in opposition ("Br. Opp."), respondent Canadian plaintiffs do not dispute that the federal common law of the United States governs the international comity questions raised by the anti-anti-suit injunction entered by the Harrison County trial court in this case. Nor do they deny that this federal common law sets minimum standards of deference to foreign sovereigns binding on federal and state courts alike. They do not deny that the Texas Court of Appeals held that the Texas statute permitting them to sue in Texas effectively trumped principles of international comity imposed by federal law. Finally, they do not question the broad import of the holding below, or even attempt to explain away the fundamental affront to Canadian sovereignty perpetrated by the Texas injunction.

Instead, the Canadian plaintiffs suggest that the anti-anti-suit injunction at issue here is not inconsistent with general principles of international comity because the Texas court was merely protecting its jurisdiction. That explanation begs the question, because it is plain that Texas has no interest in asserting its jurisdiction in the first place.

I. ANY PRESUMPTION IN FAVOR OF CONCURRENT PROCEEDINGS HAS NO APPLICATION WHERE ONE FORUM HAS NO SUBSTANTIVE INTEREST IN THE SUBJECT MATTER OF THE CONTROVERSY.

Pointing out that "[t]he Texas court has made no attempt to prevent parallel litigation from proceeding in Canadian courts," Br. Opp. at 6; *see* Br. Opp. App. at 6a, respondents suggest that principles of international comity are not violated here because " ' "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously." ' " Br. Opp. at 4 (quoting *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (quoting *Laker Airways Ltd. v. Sabena,*

Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984))). Thus, like the Texas Court of Appeals, respondents attempt to defend the trial court's entry of the injunction as a legitimate measure to protect its jurisdiction.

The Texas court's interest in protecting its own jurisdiction, however, can extend no further than its interest in the underlying controversy. Unsurprisingly, the cases cited by respondents demonstrate that any presumption in favor of parallel proceedings—and hence the justification for entering an anti-anti-suit injunction to protect a proceeding—arises only where both fora have a substantive interest in the underlying controversy. *See, e.g., Laker Airways*, 731 F.2d at 938-41 (anti-anti-suit injunction upheld to ensure the application of American antitrust laws to alleged conduct in the United States); *see also China Trade*, 837 F.2d at 36-37 (discussing *Laker Airways, supra*); *cf. Randall v. Arabian American Oil Co.*, 778 F.2d 1146, 1153 (5th Cir. 1985) (where United States citizen working in Saudi Arabia pursuant to employment contract negotiated and executed in the United States sues Delaware corporation for wrongful discharge, federal court need not give effect to exclusive jurisdiction provision of Saudi law).

Here, it is undisputed that neither the plaintiffs nor the causes of action on which they sue have any connection to Texas.[1] Indeed, the Texas Court of Appeals has readily acknowledged that "[t]he natural forum [for the action] would be Canada because the circumstances that gave rise to the suit occurred in Canada, . . . the plaintiffs are citizens of Canada," Pet. App. A3, and "[a]ll damages were alleged to have occurred in Canada." Pet. App. A2.

---

1 Respondents state that one plaintiff alleged that he had worked in Texas. Br. Opp. at 2. The Texas Court of Appeals did not mention such an allegation, and even respondents' statement leaves unclear whether this one plaintiff's alleged Texas employment bears any relationship to his cause of action. In any event, the inclusion of such a plaintiff would not change the analysis with respect to the remaining 215 plaintiffs or the action as a whole.

At the same time, the only Texas interest identified by the Texas Court of Appeals is the authority of a Texas court to "enjoin its residents, be they corporate or individual, from seeking to enjoin the Texas court from proceeding with litigation over which it has jurisdiction." Pet. App. A6. In its opinion on rehearing, the Court relied on "the right of the State of Texas to control its own corporate citizens outside its territorial boundaries." Pet. App. A9. The Court did not suggest that the corporate defendants had been incorporated in Texas or even maintained their principal place of business there; citing Texas authority, it simply concluded that "a corporation doing business in Texas is treated as a resident." Pet. App. A5 n.2 (citing *PPG Industries, Inc. v. Continental Oil Co.*, 492 S.W.2d 297 (Tex. Civ. App. 1973)).

But Texas cannot frustrate otherwise applicable federal principles of international comity merely by asserting an interest, as a matter of Texas law, in regulating the extraterritorial conduct of corporations that do business there. "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Restatement (Third) of the Foreign Relations Law of the United States* § 213 (1987); *see Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982); *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3 ¶¶ 70-71. Under the domestic law of the United States, moreover, the law of the state of incorporation generally governs the internal affairs of a corporation, and states of the United States otherwise exercise jurisdiction to prescribe as to corporations on the basis of territoriality. *Restatement (Third) of Foreign Relations Law* § 213 reporters' note 5; *id.* § 402 reporters' note 5.

Hence, for purposes of resolving a conflict in jurisdiction to prescribe, the mere fact that the defendant corporations do business in Texas does not give Texas an interest in regulating conduct outside Texas that has no impact in Texas. *See id.* § 403(2) (setting forth factors for evaluating the reasonableness of exercise of jurisdiction to prescribe). International law "involve[s] for every State an obligation to exercise modera-

tion and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State." *Barcelona Traction*, ¶ 70 (separate opinion of Judge Fitzmaurice). Were the rule otherwise, every state in which a corporation does business could assert an equal interest in regulating the corporation's affairs, even when the activity giving rise to the cause of action had nothing to do with the state, regardless of territoriality and nationality constraints.

The respective Canadian provinces, acting through their courts, clearly have a substantial interest in determining where their citizens may bring suit on these causes of action. The British Columbia Court of Appeal has held that the British Columbia citizens should not be permitted to go forward in Texas. And the premise of the Texas injunction is that any other Canadian court to consider the issue would reach the same conclusion.

Because Texas's interest in the underlying controversy is nonexistent, it is plainly unreasonable for it to attempt to override or preempt the Canadian courts' determination. *Restatement (Third) of Foreign Relations Law* § 403(1)-(2). Even were its exercise of jurisdiction not unreasonable on its own terms, the Texas court would still have an obligation to defer to Canada because Canada's "interest is clearly greater." *Id.* § 403(3). As a result, international law, and therefore principles of international comity, prohibit the Texas court from enjoining the defendants before it from seeking a ruling from the appropriate Canadian courts that these Canadian citizens must pursue their claims in Canada.

II. PLAINTIFFS' DESIRE TO HAVE TEXAS REGULATE BEYOND ITS BORDERS CANNOT JUSTIFY THE INJUNCTION.

Candidly identifying the real purpose for bringing suit in Harrison County, Texas, respondents suggest that the injunction is necessary to prevent these defendants from " 'adher-

[ing] to a double standard when operating abroad.' " Br. Opp. at 4 (quoting *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 687 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991)). They further suggest that "[i]n the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental cost of their actions." *Id.* (quoting *Dow Chemical*, 786 S.W.2d at 689 (Doggett, J., concurring)).

There is not the slightest support in this record for any suggestion that Canadian courts are not fully capable of assessing petitioners' alleged liability on respondents' claims, or that Canadian law does not provide an adequate remedy for the wrongs respondents allege. Respondents' argument reduces to the proposition that justice can be guaranteed only if Texas is permitted to volunteer its services as a judicial forum, under any circumstances, to any plaintiffs, regardless of the views of the plaintiffs' own sovereign on the propriety of suit in the Texas forum.

The extraterritorial projection of United States regulatory authority has long been a source of friction between this nation and many of its principal trading partners. Indeed, only last Term the Court reaffirmed and applied the canon of statutory construction that federal legislation is presumptively to be given no extraterritorial effect. In doing so, the Court explained the origins of that presumption in language fully applicable to the case at bar. It stated that this presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991).

If the extraterritorial projection of federal authority creates friction, the potential for disruption would increase fifty-fold were the individual states always to insist, as the Texas court has done here, on exercising purported authority to determine a particular question simply because they have personal jurisdiction over the parties to the controversy. To the contrary,

principles of international comity require a court in the United States to yield in appropriate circumstances to the superior interest of a foreign sovereign even where the court may have authority to act. *See, e.g., In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 487-90 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919, 932-34 (9th Cir. 1991), *petitions for cert. filed*, No. 91-1111 (Jan. 9, 1992), No. 91-1131 (Jan. 10, 1992), No. 91-1128 (Jan. 13, 1992), No. 91-1146 (Jan. 13, 1992).

In order to avoid international friction, the Court should take this opportunity to make clear that principles of international comity are binding on Texas courts as a matter of federal common law and that, in this case, those principles require the Texas trial court to defer to the Canadian courts' determination as to where these Canadian citizens may bring suit.

CONCLUSION

For the foregoing reasons and those set forth in the petition, petitioners respectfully request that the petition be granted.

Respectfully submitted,

Kevin F. Risley
Thomas W. Taylor
BUTLER & BINION
1600 First Interstate
Plaza Bank
1000 Louisiana
Houston, Texas 77002-5008

Of Counsel

David W. Rivkin
Donald Francis Donovan
Counsel of Record
Mary Ann Doyle
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Petitioner
Owens-Corning
Fiberglas Corporation

Dennis Chambers
ATCHLEY, RUSSELL, WALDROP
& HLAVINKA
P.O. Box 1049
Texarkana, Texas 75504

Attorneys for Petitioner
Keene Corp.

Greg Bevel
DEHAY & BLANCHARD, L.L.P.
Plaza of the Americas
2500 South Tower, LB 201
Dallas, Texas 75201-2880

Attorneys for Petitioners
Armstrong World Industries, Inc.
and National Gypsum Co.

Mel Bailey
DEHAY & BLANCHARD, L.L.P.
Plaza of the Americas
2500 South Tower, LB 201
Dallas, Texas 75201-2880

Attorneys for Petitioner
Georgia-Pacific Corp.